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Supreme Court, U.S.
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No. 99-1181

In the

Supreme Court of the United States

ALBERT ZUCKER, SARAH MANDELBAUM, WEISS & YOURMAN and STULL, STULL & BRODY,

Petitioners,

v.

OCCIDENTAL PETROLEUM CORP., RAY IRANI, HOWARD COLLINS, WALTER KAUFMANN and LAWRENCE W. SCHONRBUN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

A review of Respondent's brief reveals that the arguments against granting the Writ of Certiorari fall into three distinct categories: 1) a slanted "recitation" of the record in the underlying case, 2) a crabbed analysis of the holdings in the cases of *In re First Capital Holdings Financial Prod. Sec. Litigation*, 33 F. 3d 29 (9th Cir. 1994) and *Valley Force Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) and 3) an appeal that both trial and appellate courts should have unfettered and unlimited rights to review and modify attorney fee awards regardless of issues of standing, mootness or any other Constitutional restraint.

Since this Court is more than competent to review the record and is unquestionably adept at interpreting case law, Petitioners do not feel the need to repeat their prior analysis of underlying record or the proper interpretation of the above-referenced case law. Nevertheless, a degree of analysis is required relative to the Respondent's third contention relating to the right of judicial review of attorney fee awards.

COURTS DO NOT HAVE AN UNLIMITED RIGHT TO REVIEW AN AWARD OF ATTORNEY FEES

Although suffused throughout the Opposition, Respondent gets to the heart of his argument when he states that a "case or controversy standing inquiry was unnecessary since the court's fee determination was ancillary to its approval of the settlement.". (Opposition at 12). Under Respondent's formulation, a Court could *always* move back and review any award of attorney fees at *any stage of a proceeding* simply through the invocation of "ancillary"

jurisdiction - *regardless* of whether any real controversy remained between the parties. In support of this proposition, Respondent places its reliance upon two cases: *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir. 1975) and *In re General Motors Pick- Up Truck Fuel Tank Litigation,* 55 F.3d 768 (3d Cir. 1995). Neither of these cases are sufficient to support Respondent's weighty axiom.

In the *Grunin* case, at least one party and several attorneys appealed for a review of a trial court's decision regarding *both* a substantive settlement as well as an award of attorney fees at the conclusion of an anti-trust class action. After finding that the substantive settlement was acceptable, the Court turned its attention to the propriety of the various awards of attorneys fees. During this process, the Court dealt with a contention raised at oral argument that one of the attorneys lacked standing to raise the issue of the propriety of the fees charged by another attorney in the underlying case. In dispensing with this issue, the Appellate Court indicated that *since the propriety of the underlying settlement was being questioned, "the reasonableness of the attorneys' fees is within the overall supervisory review of this court." Grunin*, supra, at 127, fn.13. In point of fact, the Court did not completely jettison the notion of the need of standing or even the concept of mootness: instead, it simply indicated that where review by the appellate court was proper as to the propriety of a settlement, it could retain the authority to review the *entire* settlement in order to determine its ultimate fairness to the class.

A review of the record reveals that *Grunin* is simply not applicable to the case at hand. In the instant case, the basis for Kaufmann's appeal was a direct attack upon the propriety of the attorney fees award. Therefore, it is asserted

that when Kaufmann sold his stock, he lost standing as to the entire basis of his appeal.[1]

Respondent's other primary authority, the above-cited *General Motors* decision, is equally unavailing. In two separate sections of its brief, Respondent cites the same language within the case of *In Re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 820 (3rd Cir. 1995) as support for the proposition that a class member *always* has the right to review an award of attorney fees *regardless* of standing issues. A thorough review of this decision reveals that no such binding "authority" was created by the appellate court's ruling.

As in the *Grunin* case, the appeal of the underlying *General Motors* settlement order was made on the basis of the presence other recognizable issues conferring jurisdiction upon the appellate court. In particular, objectors had raised issues regarding the trial court's failure to formally certify a settlement class, the adequacy of class notice, the trial court's denial of discovery concerning class negotiations and several other factors *along with the issue of the propriety of the attorney fees award. Id.* at 777. In ruling that the underlying settlement was unfair and was based on inadequate findings, the court turned its attention to the issue of attorney fees and commenced its analysis with an acknowledgment that on this issue, its opinion was *mere dicta* because its remand to the trial court was based upon issues relative to class "certification and settlement approval issues". *Id.* at 819.

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[1] To this end, it is significant to note that the Respondent conveniently side-steps the holdings in *Fischer v. CF & I Steel Corp.,* 599 F. Supp. 340 (S.D.N.Y. 1984); *Lewis v. Anderson,* 477 A.2d 1040 (Del. 1984); *Trane Co. v. O'Connor Securities,* 718 F.2d 26 (1983) and, most importantly, *Arizonans for Official English v. Arizona,* 117 S.Ct. 1055 (1997) and *Di Giorgio v. Josephine Lee, et. al.,* 134 F.3d 971 (9th Cir. 1998).

Thereafter, the court restated the bland proposition that within the context of class actions, trial courts should normally review the awards of attorney fees because of the possibility of collusion. *Id.* at 820. In so doing, it merely indicated the parameters of the constructive common fund doctrine: it did *not* obviate the requirement that a party seeking to contest an award of attorneys fees in a class action have standing.

The bulk of authority indicates that standing is a fundamental requirement when there is a direct attack upon the propriety of attorney fees awards. See *Rogers v. Bank of America,* 142 F.2d 128 (9th Cir. 1944))(bank which had sued to quiet title to the land in estate's possession, but had filed no monetary claim against the estate, lacked standing to contest allowance of estate's attorney's fees that would be paid out of the very rents the bank was claiming); *Benitez v. Swanger,* 888 F.2d 930 (1st Cir. 1989)(statutory standing requirement in civil rights litigation as prerequisite to contest attorney fee award); *Dykes v. Dykes*, 10 F.3d 184, 188 (3rd Cir. 1993) (necessity of standing to contest award of attorney fees in bankruptcy proceedings). Also see *Securities & Exchange Commission v. Securities Northern, Inc.*, 573 F.2d 622, 626 (9th Cir. 1978)(appeal of a party to an SEC investigation dismissed since he was "seeking to champion the rights of another" and had an interest which was "indirectly pecuniary...remote and [in]consequential rather than direct and immediate"). Since the decisions in *Grunin* and *General Motors* did not change or alter the requirement that a party seeking to contest an attorney fee award have standing, it is asserted that the Petition should be granted.

CONCLUSION

As indicated in the Petitioners' initial brief, the United States Supreme Court and other tribunals clearly require the presence of an actual case and controversy in order to invoke the power of the federal government. In light of the fact that Respondent has no such real and actual interest in the issue of attorney fees - having freely disbursed his rights through his voluntary sale of Occidental securities - it is submitted that the rulings of the Ninth Circuit on the initial appeal and all orders and appellate opinions emanating from Objector's Kaufmann's actions should be vacated.

DATED: March 23, 2000.

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